A **SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA (SPRM)**

v.

MATDLAN JAMEO

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CASE NO: KCH-42A-1/2-2012]
14 JUNE 2012

C

CRIMINAL PROCEDURE: *Prosecution - Conduct of - Prosecution by prosecuting officer of Malaysian Anti-Corruption Commission - Whether consent of Public Prosecutor mandatory - Whether failure to tender consent to prosecute rendered trial a nullity - Criminal Procedure Code,* D *s. 422 - Whether applicable*

CRIMINAL PROCEDURE: *Prosecution - Consent by Public Prosecutor - Failure by prosecution officer to tender consent to prosecute - Whether rendered trial a nullity - Whether curable - Whether subsequent tendering of consent to prosecute sufficient - Criminal Procedure Code,* E *s. 422*

CRIMINAL PROCEDURE: *Trial - Nullity - Whether court ought to order retrial instead of acquitting and discharging respondent - Whether respondent prejudiced in his defence if retrial ordered - Whether valid* F *ground submitted to negate retrial*

The respondent in this appeal was charged under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 for accepting RM50 from one Simon anak Sanjan as an inducement for not G issuing a summons against him for an offence under the Road Transport Act 1987. The respondent was first charged before the SCJ sitting in the A-Track Court on 27 July 2011 and the trial subsequently proceeded in the administratively designated "Corruption Court". On 3 November 2011, the prosecuting H officer, from the Malaysian Anti-Corruption Commission ('MACC'), told the court that he had forgotten to tender the consent to prosecute and applied to tender the same. However, the DPP who was present told that court that the consent to prosecute and letter of authorisation was produced before the A-I Track Court earlier. Nevertheless, the SCJ noted that the consent to prosecute and the letter of authorisation was not in the record

and proceeded to mark it as exhibits. At the end of the trial, the judge ruled that the failure by the prosecuting officer to submit the consent to prosecute at the commencement of trial rendered the trial a nullity and discharged and acquitted the respondent. It was submitted by the learned DPP that the consent to prosecute was tendered in the A-Track Court on 27 July 2011 and that the lack of consent to prosecute, if any, was curable under s. 422 of the Criminal Procedure Code ('CPC').

Held (allowing appeal):

(1) The prosecuting officer told the court on 30 November 2011 that he had "forgotten" to tender the consent to prosecute at the outset of trial on 27 July 2011. The prosecuting officer was in the best position to make the statement from the Bar as he had appeared on behalf of the prosecution on 27 July 2011 and he was the same officer who had conducted the prosecution in the Sessions Court. His subsequent change of position, that he had tendered the consent to prosecute on 27 July 2011, seemed to be an afterthought. The statement of the DPP who was not present during the arraignment of the respondent should carry no weight. Moreover, the search for a copy of the consent to prosecute at the lower court file resulted in the negative. Hence, the findings of the SCJ that the consent to prosecute was not tendered on 27 July 2011 should not be disturbed. (para 4)

(2) The consent of the Public Prosecutor is implicit if a DPP had conducted the prosecution. In the instant case, the prosecution was conducted by the prosecuting officer of the MACC and not by the DPP. In the circumstances, s. 422 of the CPC was not applicable to cure the failure to tender the consent to prosecute as the section provides that only error, omission or irregularity in a consent is curable and not want of consent. Thus, the failure to tender the consent to prosecute at the outset of the trial had rendered the trial a nullity; *Lyn Hong Yap v. PP* (refd). (paras 5, 6 & 7)

(3) The belated tendering of the consent to prosecute by the prosecuting officer was not sufficient; *Perumal v. PP* (foll). (para 8)

(4) The normal order made by the court when a trial was declared a nullity was to order a retrial. However, there are exceptions in cases where the accused would be prejudiced in his defence due to passage of time, especially in a capital offence case. In the instant case, the respondent was charged less than a year ago and there was no suggestion that the respondent would be prejudiced in his defence. Further, the submission that he was a government servant and that his career would be affected was not a valid ground for not ordering a retrial. Therefore, the order of acquittal was set aside and substituted with an order that the accused be retried before another SCJ. (paras 10, 11 & 12)

Case(s) referred to:
Ang Theam Choom v. PP [2002] 4 CLJ 538 CA ***(refd)***
Lyn Hong Yap v. PP [1953] 1 LNS 52 HC ***(refd)***
Perumal v. PP [1970] 1 LNS 189 FC ***(refd)***
PP v. Seridaran p1984] 1 MLJ 141 ***(refd)***
Tarmizi Yacob & Anor v. PP & Another Appeal [2010] 8 CLJ 501 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Malaysian Anti-Corruption Commission Act 2009, s. 17(a)
Prevention of Corruption Ordinance, s. 12

For the appellant - Law Chin How; DPP
For the respondent - Roger Chin; M/s Roger Chin & Co Advocates
Osman Ibrahim; M/s Osman Ibrahim & Co Advocates

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an appeal by the public prosecutor against the acquittal and discharge of the respondent on a charge under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009. The respondent, a Lance Corporal with Pasukan Gerakan Am was charged with accepting RM50 from one Simon anak Sanjan as inducement for not issuing a summons against him for an offence under the Road Transport Act 1987. The respondent was acquitted and discharged at the end of the case for the defence.

The Appeal

[2] The learned Sessions Court Judge stated in his judgment that he would have convicted him on the evidence but for the lack of consent to prosecute. This was the sole ground for the acquittal of the respondent. It is surprising that the court should decide on this technicality only at the end of the trial and waste precious judicial time. I shall therefore briefly re-state what had transpired in the court below.

[3] The respondent was first charged before the Sessions Court Judge sitting in the A-Track court on 27 July 2011 at 3.40pm. The respondent was represented by Encik Osman Ibrahim. He claimed trial. Subsequently, the trial proceeded in the administratively designated "Corruption Court" which is a Sessions Court that specialises in hearing only corruption cases. Encik Osman Ibrahim represented the respondent whereas Encik Othman Anyan who is a prosecuting officer from the Malaysian Anti-Corruption Commission prosecuted. On 3 November, when the 8th witness for the prosecution was called, the prosecuting officer suddenly told the court that he had forgotten to tender the consent to prosecute and applied to tender the consent to prosecute and letter of authorisation. Deputy Public Prosecutor (DPP) Law Chin How who was also present told the court that the consent to prosecute and letter of authorisation were produced before the A-Track court earlier. The Sessions Court Judge however noted that the consent to prosecute and letter of authorisation were not in the record. He then proceeded to mark the consent to prosecute and letter of authorisation as exh. A and B. The trial then proceeded. After the defence was called and the defence witnesses had testified, the counsel for respondent received the complete notes of proceedings. Counsel for respondent then raised the issue that the consent to prosecute was not tendered when the case was first called in the A-Track court on 27 July 2012. He submitted that it was also not tendered until PW8 had taken the witness stand. The Sessions Court Judge adjourned the matter for submissions. After considering the submissions of parties, the Sessions Court Judge ruled that the failure of the prosecuting officer to submit the consent to prosecute at the commencement of the trial rendered the trial a nullity. The learned DPP has submitted before me that the consent to prosecute was tendered in the A-Track court on 27 July 2011. He also submitted that the lack of consent to prosecute, if any, is curable under s. 422 of the Criminal Procedure Code.

A **Issues**

[4] The first issue I shall address is whether the Sessions Court Judge was correct in holding that the consent to prosecute was not tendered at the outset on 27 July 2011. In my opinion, his finding was correct and should not be interfered with. Othman bin Anyan, the prosecuting officer from the Malaysian Anti-Corruption Commission, appeared on behalf of the prosecution on 27 July 2011. The same officer also conducted the prosecution in the Sessions Court. On 3 November 2011, he told the court that he had "forgotten" to tender the consent to prosecute on 27 July 2011. The DPP who appeared with him only on that occasion told the court that consent to prosecute was produced earlier before the A-Track court. However, it must be noted that the learned DPP did not appear before the A-Track court on 27 July 2011. It was Othman Anyan who appeared before the A-Track court when the respondent was first arraigned. If Othman Anyan had told the Sessions Court Judge that he had submitted the consent to prosecute, the court could accept his statement from the Bar. However, Othman Anyan told the court that he had forgotten to tender it earlier. I am mindful that at the end of the case of the defence, Othman Anyan changed his position and told the court that he had tendered the consent to prosecute in the A-Track court on 27 July 2011. However, this claim seems to be an afterthought as he had already told the court on 3 November 2011 that he had forgotten to tender the consent to prosecute earlier. Since Othman Anyan was in the best position to make the statement from the Bar, the statement from the Bar of DPP Law Chin How who was not present during the arraignment of the respondent should carry no weight. Furthermore, even if the learned Sessions Court Judge omitted to record the tendering of the consent to prosecute, a copy of it should be in the lower court file and the exhibit record form should reflect that it had been tendered. I have caused the lower court file to be searched but a copy of the consent to prosecute, apart from the one tendered on 3 November 2011, is not found. There is no exhibit record form either which states that the consent to prosecute had been tendered. Therefore, in all probability and given the initial admission of Othman Anyan that he had forgotten to tender the consent to prosecute, the finding of the Sessions Court Judge that the consent to prosecute was not tendered on 27 July 2011 should not be disturbed.

[5] The second issue that arises is whether the failure to tender the consent to prosecute at the outset of the trial is fatal. I must firstly observe that the DPP did not prosecute the case himself. This fact is significant because the consent of the public prosecutor is implicit if a DPP had conducted the prosecution (see the recent Federal Court case of *Tarmizi Yacob & Anor v. PP & Another Appeal* [2010] 8 CLJ 501 and the older cases cited therein). The prosecution in the instant case was conducted by the prosecuting officer of the Malaysian Anti-Corruption Commission. The learned DPP submitted that s. 422 of the Criminal Procedure Code can cure the failure to tender the consent to prosecute. Section 422 reads as follows:

> **422. Irregularities not to vitiate proceedings.**
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[6] It is provided that the want of sanction is curable. However, only error, omission or irregularity in a consent is curable. In *Ang Theam Choom v. PP* [2002] 4 CLJ 538, the Court of Appeal said by way of *obiter* that want of consent unlike want of sanction cannot be excused by s. 422. The relevant passage in that judgment is as follows:

> In our view the cases on sanction should be distinguished. Where sanction is required, no prosecution can commence unless it is sanctioned by the Public Prosecutor. Even then, under the circumstances provided in s 422(b) of the Criminal Procedure Code, want of sanction is excused. In the case of "consent to prosecute", no prosecution shall be instituted except by or with the consent of the Public Prosecutor – s. 177A of the Criminal Procedure Code. But want of consent is not excused by s. 422 of the Criminal Procedure Code.

[7] In the old case of *Lyn Hong Yap v. PP* [1953] 1 LNS 52, Thomson J opined that the want of consent under s. 12 of the Prevention of Corruption Ordinance is not an omission that can be cured by reason of s. 422 of the Criminal Procedure Code. However, on the facts of that case, Thomson J accepted the assurance of the DPP that the consent was indeed tendered in the lower court where a police officer conducted the prosecution. The *obiter* statement of Thomson J that the want of consent is incurable has been universally accepted and followed by Malaysian courts. In this case, as the prosecution was not conducted by the DPP, the failure to tender the consent to prosecute at the outset of the trial had rendered the trial a nullity, as decided by the Sessions Court Judge.

[8] The third issue is whether the consent to prosecute that was given midway during the trial is sufficient. As I noted earlier, the prosecuting officer only tendered the consent to prosecute when PW8 gave evidence. This issue can be disposed off immediately by reference to the Federal Court case of *Perumal v. PP* [1970] 1 LNS 189. Suffian FJ (as he then was) held in that case that:

> ... if no consent is available and no deputy public prosecutor is present at the time when an accused person is called upon to plead to an offence under the Act, the consent of the deputy public prosecutor given subsequently does not constitute sufficient consent for the prosecution within the meaning of s. 26.

[9] In the premises, the belated tendering of the consent to prosecute by the prosecuting officer in the instant case is not sufficient.

[10] The fourth issue is whether the decision of the learned Sessions Court Judge to order an acquittal is correct in law. The learned DPP submitted that the Sessions Court should have ordered a retrial instead of acquitting the respondent. This submission is not without basis as the normal order that is made when a trial is declared a nullity is to order a retrial. In *PP v. Seridaran* [1984] 1 MLJ 141, Peh Swee Chin J stated the rationale of ordering a retrial as follows:

> At this juncture, I must also express my complete agreement with the learned Deputy's submission that even assuming the trial to be a nullity, the order of acquittal was wrong; and that, instead the learned magistrate should have discharged the defendant, with such discharge not amounting to an acquittal **for if a trial is a nullity it is as good as not having taken place**. (emphasis added)

[11] However, exceptions have been made in cases where the accused would be prejudiced in his defence due to passage of time, especially in capital offence cases. In the instant case, the respondent was charged less than a year ago. There is no suggestion that the respondent would be prejudiced in his defence. The only submission made by his counsel is that he is a government servant and that his career would be affected. In my opinion, that is not a valid ground for not ordering a retrial.

[12] For the foregoing reasons, I shall allow the appeal and set aside the order of acquittal and in its place substitute an order that the accused be retried before another Sessions Court Judge. I make the said order as the Sessions Court Judge in the instant case had already given his opinion that there was sufficient evidence to convict the respondent if not for the failure of the prosecution to tender the consent to prosecute at the outset of the trial. Order accordingly.